

STATE OF MICHIGAN
COURT OF APPEALS

ANGELA MASSENBERG, Independent Personal
Representative of the Estate of MATTIE LU
JONES, Deceased,

Plaintiff-Appellee,

v

HENRY FORD HEALTH SYSTEM, d/b/a
HENRY FORD HOSPITAL AND MEDICAL
CENTERS,

Defendant-Appellant.

UNPUBLISHED
September 25, 2003

No. 236985
Wayne Circuit Court
LC No. 99-932364-NH

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ.

PER CURIAM.

Plaintiff commenced this wrongful death action alleging medical malpractice after plaintiff's decedent, Mattie Lu Jones (hereinafter "the decedent"), died during emergency surgery at defendant hospital. Plaintiff's theory was that defendant's doctors, who regularly treated the decedent, failed to earlier diagnose liver abscesses, which ultimately caused the decedent's death. Following a jury trial, plaintiff was awarded past economic damages of \$6,000 and past noneconomic damages of \$186,000. After the trial court added attorney fees, costs, and interest, plaintiff was awarded a total judgment of \$245,048. Defendant now appeals as of right. We affirm.

I

Defendant argues that the trial court erred in determining that plaintiff's expert, Dr. Edward Goldberg, was qualified to provide expert testimony under MCL 600.2169. We disagree.

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

The decedent's treating physician, Dr. Vanessa Robinson, was board-certified in internal medicine and geriatrics.¹ Dr. Goldberg was board-certified in internal medicine and gastroenterology. Defendant argued that Dr. Goldberg's professional qualifications did not satisfy MCL 600.2169(1)(b) because he equally divided his practice between internal medicine and gastroenterology.

MCL 600.2169(1)(b) requires that an expert witness must devote "a majority of his or her professional time" to the active clinical practice of the same specialty as the treating physician. We believe that the trial court properly admitted Dr. Goldberg's testimony under MCL 600.2169. Although Dr. Goldberg practiced both internal medicine and gastroenterology, as the trial court observed, the record discloses that gastroenterology is a subspecialty of internal medicine. Defendant's own witnesses recognized and acknowledged that Dr. Goldberg's certification in gastroenterology reflected greater expertise and more detailed knowledge with respect to the functioning of the liver. Thus, the trial court correctly held that a majority of Dr. Goldberg's practice was devoted to internal medicine even though a portion of that time was devoted to the subspecialty of gastroenterology. We do not believe that MCL 600.2169 should be read so narrowly that an expert with Dr. Goldberg's credentials would be barred from testifying as an expert witness on internal medicine. See *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215, 218-221; 642 NW2d 346 (2002).

II

Next, defendant argues that there was insufficient evidence to support plaintiff's theory that the decedent's liver abscesses existed on July 15, 1996, and, therefore, Dr. Robinson could not have committed malpractice for failing to diagnose an abscess at that time.

Defendant moved for judgment notwithstanding the verdict (JNOV) or a new trial on this issue. A trial court's decision on a motion for JNOV is reviewed by this Court de novo. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 395; 628 NW2d 86 (2001). This Court must review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995). A motion for JNOV should only be granted where the evidence, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Id.* at 558. If reasonable jurors honestly could have reached different conclusions based upon the evidence, neither the trial court nor this Court may substitute its judgment for that of the jury. *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995).

In the alternative, defendant argues that the jury's verdict was against the great weight of the evidence and that the trial court should have granted its motion for a new trial. This Court

¹ Plaintiff's theory of malpractice was based solely on Dr. Robinson's failure to comply with the applicable standard of care in internal medicine. Defendant never argued below that any expert testimony offered against her could only be from a board-certified specialist in geriatrics.

reviews a trial court's decision on a motion for a new trial for an abuse of discretion. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). Substantial deference is given to the trial court's decision that the jury's verdict was not against the great weight of the evidence. *Id.* An appellate court may overturn a jury's verdict based upon the great weight of the evidence "only when it was manifestly against the clear weight of the evidence." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999), quoting *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996). The jury's verdict may not be set aside if there is competent evidence to support it. *Ellsworth, supra* at 194.

We disagree with defendant's claim that Dr. Goldberg's opinion that Dr. Robinson committed malpractice was dependent upon the presence of a single abscess of fourteen centimeters. Dr. Goldberg admitted that the autopsy report was unclear whether there was a single large abscess or two smaller abscesses. Dr. Goldberg testified that if there was a single large abscess of about fourteen centimeters, an abscess that large would have existed in July 1996. However, even if there were two smaller abscesses, Dr. Goldberg believed that they were also large enough that they would have existed in July 1996, and should have been diagnosed then by Dr. Robinson. Accordingly, the trial court did not err in denying defendant's motion for JNOV or a new trial on this issue.

III

Defendant also argues that the trial court should have granted JNOV or a new trial because the evidence showed that the decedent's elevated SGPT test results could have been caused by her obesity or the medication she was taking. Therefore, defendant argues, Dr. Robinson was not required to follow up to determine why the decedent's enzyme levels were elevated. However, the record discloses that Dr. Goldberg testified, and Dr. Robinson also acknowledged, that elevated SGPT test results can also be caused by a liver abscess. Further, Dr. Goldberg believed that the standard of care required Dr. Robinson to offer follow-up care to determine why the test results was elevated. Viewed most favorably to plaintiff, this testimony enabled the jury to find that Dr. Robinson committed malpractice by failing to offer follow-up care to determine the cause of the elevated liver enzyme levels. Thus, the trial court did not err in denying defendant's motion for JNOV or a new trial on this ground.

IV

Defendant next argues that it was prejudiced because the jury heard evidence of other acts of alleged malpractice committed by Dr. Robinson before July 15, 1996.

Although evidence suggestive of earlier malpractice was presented at trial, plaintiff's theory of recovery was based solely on Dr. Robinson's alleged malpractice on or after July 15, 1996. In order to avoid any undue prejudice to defendant, the court instructed the jury that it was not to consider any evidence of malpractice committed by Dr. Robinson before July 15, 1996. The court also included specific instructions on the verdict form that the jury was only to decide whether malpractice occurred on or after July 15, 1996.

We agree that the trial court's instructions and verdict form, emphasizing and instructing the jury that it was not to consider earlier evidence of alleged malpractice in its deliberations, were sufficient to cure any prejudice to defendant. Defendant was not denied a fair trial and, accordingly, the trial court properly denied a new trial on this ground.

V

Defendant finally claims that it was denied a fair trial because of prejudicial comments made by plaintiff's attorney during closing arguments. Defendant failed to preserve this issue by timely objecting to the challenged remarks at trial. Regardless, we find no basis for reversal under a review for plain error affecting substantial rights, which review is permitted pursuant to the Michigan Rules of Evidence. MRE 103(d). Defendant also raised this issue in its motion for a new trial, which the trial court denied. We review the trial court's decision denying defendant's motion for a new trial for an abuse of discretion. *McPeak v McPeak (On Remand)*, 233 Mich App 483, 490; 593 NW2d 180 (1999).

In *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996), this Court explained:

When reviewing asserted improper comments by an attorney, we first determine whether the attorney's action was error and, if it was, whether the error requires reversal. *Wilson v General Motors Corp*, 183 Mich App 21, 26; 454 NW2d 405 (1990). An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Id.* Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved. *Hammack v Lutheran Social Services*, 211 Mich App 1, 9; 535 NW2d 215 (1995).

Counsel's comments about the missing record were based upon reasonable inferences drawn from the evidence and, as such, did not constitute plain error. See *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 639; 601 NW2d 160 (1999). Because the critical records concerning the decedent's treatment on July 15, 1996, were missing from her medical file, counsel had a factual basis for arguing that they may have been intentionally removed. See *Powell v St John Hosp*, 241 Mich App 64, 80 n 9; 614 NW2d 666 (2000). Further, any prejudice could have been cured by a cautionary instruction, had defendant objected. *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 704; 513 NW2d 230 (1994).

Counsel's comments about the credibility of Drs. Patton and Savera also do not warrant reversal. Generally, an argument that a witness is lying is improper only if the accusations are unsubstantiated. See *Powell, supra* at 80; *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 290-291; 602 NW2d 854 (1999). Here, counsel simply urged the jury to evaluate the credibility of defendant's witnesses based upon all of the circumstances surrounding their testimony. Defendant has failed to show that the remarks amounted to plain error.

Finally, counsel's suggestion that the treating doctors purposely delayed treatment to generate income, even if improper, was not so prejudicial as to divert the jury's focus from the facts and issues in the case. Any prejudice caused by the remarks could have been cured by a cautionary instruction upon timely request.

Accordingly, a new trial is not warranted on the basis of the alleged misconduct by plaintiff's attorney.

Affirmed.

/s/ William B. Murphy

/s/ Jessica R. Cooper

/s/ Charles L. Levin